No. 2583

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAN D. SUTHERLAND,
Plaintiff in Error,

vs.

F. W. PURDY,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

T. C. WEST,
T. J. DONOHOE,
E. E. RITCHIE,
O. A. TUCKER,
Attorneys for Plaintiff in Error.

Filed this ..... *day of December, 1915.*

Filed
DEC 4 - 1915

FRANK D. MONCKTON, Clerk.

F. D. Monckton,

By ..... *Deputy Clerk.*

PERNAU PUBLISHING COMPANY

No. 2583

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAN D. SUTHERLAND,
Plaintiff in Error,

vs.

F. W. PURDY,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This action is based upon rival assertions of right to a mining claim in the Chisana, or Sushanna, district of Alaska. Plaintiff in error was plaintiff in the trial court and defendant in error was defendant. They will be referred to in this brief as in the court below.

On July 6, 1913, one G. L. Gates, claiming to act as attorney in fact for defendant, F. W. Purdy, located the disputed ground in Purdy's name by the usual method of posting discovery notice and marking boundaries. Thereafter, on July 27, 1913, one McKinney filed for record a notice of said claimed location by Gates for Purdy, in the office

of the recorder of said White River precinct, wherein said mining claim is situated. It is claimed by defendant that Gates had a power of attorney in writing from Purdy. In his amended answer defendant pleads that "said power of attorney was duly recorded by Gates on July 29, 1913, at page 280 of volume 1 of the records of said White River precinct". The record of said power of attorney appears as follows:

"July 29, 1913
Frank W. Purdy to G. L. Gates
Sworn to before R. McDonald of Forty Mile May 31st 1913
Jas. McLeod
Recorded at 55 M. past 6 AM July 29, 1913—
By request of W. E. McKinney.
(Sgn) H. E. Morgan
H. H. Waller Dep."

It is not claimed by the defendant that any other power of attorney was ever recorded by or for him in the Third Judicial Division of Alaska, wherein said claim is situated. At the trial defendant did not produce any power of attorney but Gates testified that he had misplaced the one given him by Purdy. Over the objection of plaintiff the court allowed Gates and other witnesses to testify to the contents of the alleged missing document.

Plaintiff located the disputed ground on August 30, 1913, claiming the same as unoccupied public land. He pleaded and testified that he complied

with the requirements of law in all particulars in making the location.

It is admitted that the location notice posted on the ground called for a claim running 1320 feet up Big Eldorado creek. The notice recorded called for a claim running down stream. Plaintiff and other witnesses testified that the posted notice was originally on the upper end of the claim but was afterward moved to the lower end. Defendant's witnesses testified that it was originally placed at the lower end. If so it described the ground in controversy. If plaintiff's contention was true the notice did not describe the ground in controversy, but a tract of similar size beginning at its upper end.

At the time defendant's location was made by power of attorney the congressional act of August 1, 1912, was in force, as it still is, containing the following requirement as to locations by power of attorney:

> "That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no

> placer-mining claim shall hereafter be located in Alaska except under the limitations of this act."

Plaintiff contended that the plain meaning of the act requires such a power of attorney to be of record before location. Defendant contended that it was only necessary to record the power of attorney before a location by another person. The Court upheld defendant's contention. The case was tried before a jury, which returned a general verdict and special findings in favor of defendant. After plaintiff's motion for a new trial had been denied the court entered judgment in favor of defendant, and plaintiff sued out this writ of error.

Assignment of Errors.

Plaintiff assigns the following errors upon which he relies in prosecuting this writ:

I.

The court erred in overruling plaintiff's demurrer to the affirmative defense of defendant's amended answer.

II.

The court erred in refusing to permit J. J. Ford, a witness called to testify in behalf of plaintiff, to testify to markings and descriptions on boundary posts of adjoining locations of mining claims for the purpose of showing that defendant's notice

of location of the Surprise Fraction, comprising the ground in controversy in this action, does not include any part of said ground and does cover other ground, to which ruling of the court plaintiff then and there excepted and the exception was allowed.

III.

The court erred in admitting parol testimony to vary the terms of a written instrument, to wit, the power of attorney under which defendant's alleged attorney in fact, G. L. Gates, claimed authority to locate the ground in controversy herein, it being pleaded in defendant's answer that Gates' authority to locate said ground was contained in a power of attorney appearing of record in the records of White River precinct, wherein said ground is situated; said testimony being in substance as follows, to wit:

(a) The witness G. L. Gates, being called to testify on behalf of defendant, was permitted to testify over the objection of plaintiff that he had lost or misplaced a power of attorney given him by defendant, duly signed and acknowledged in Yukon territory; that said power of attorney was the authorization under which he had located the ground in controversy in this action, and was the same power of attorney which was filed for record with the recorder of White River precinct, and which said recorder purported to record. To the admission of all of which testimony plaintiff then

and there excepted and the exception was by the court duly allowed.

(b) The witness W. E. McKinney, being called upon to testify on behalf of defendant, was permitted to testify over the objection of plaintiff that he was a witness to the execution of the power of attorney from defendant Purdy to Gates, described by the witness Gates; that said power of attorney authorized said Gates to locate placer mining claims in Alaska; that Gates had given said power of attorney to said witness McKinney to file for record with the recorder of White River precinct, and that he had so filed the same for record, on the 29th day of July, 1913. To all of which testimony plaintiff then and there objected and the objection was by the court duly allowed.

IV.

The court erred in denying plaintiff's motion for a new trial.

V.

The court erred in entering judgment herein in favor of defendant and against plaintiff.

VI.

The court erred in entering a decree in favor of defendant and against the plaintiff granting a perpetual injunction against plaintiff enjoining and restraining him from asserting title to the land in controversy, this being an action of ejectment brought by plaintiff, and neither defendant's

amended answer nor his proof presenting to the court any ground or basis for equitable relief.

Argument.

Plaintiff's argument can be most logically and concisely stated by arranging it under the two contentions following:

First. The court erred in repeated rulings that the law of 1912 does not require a power of attorney authorizing a mineral location in Alaska to be recorded before a location is made under it.

Second. The court erred in admitting parol testimony to show the contents of an alleged power of attorney when the record of a so-called power of attorney under which the attorney claimed to act was pleaded in defendant's answer and the precinct recorder's record of the same was in evidence. Further, the evidence of loss of the document was insufficient to lay a foundation for admission of parol testimony.

In support of these contentions counsel for plaintiff respectfully urge the following:

FIRST. THE COURT ERRED IN REPEATED RULINGS THAT THE LAW OF 1912 DOES NOT REQUIRE A POWER OF ATTORNEY AUTHORIZING A MINERAL LOCATION IN ALASKA TO BE RECORDED BEFORE A LOCATION IS MADE UNDER IT.

Plaintiff first raised the objection that defendant's location was invalid by demurring to the af-

firmative defense of the amended answer, which set up the defendant's acts of location, including the filing of the alleged power of attorney twenty-three days after the first act of location. The demurrer was overruled by the court. Plaintiff next objected to the introduction of any testimony in support of said affirmative defense, on the same ground (T. of R. 128). This objection was overruled. The same contention was raised in special instructions asked and refused and in exceptions to instructions given.

It appears to counsel for plaintiff in error that no citation of authority will aid this court in deciding. It is simply a question of the meaning of language contained in a statute enacted for a certain purpose. That language appears to counsel for plaintiff to be so clear as to leave no room for interpretation, and therefore the rules for interpretation of statutes have no application. For emphasis the words of the statute particularly involved are here repeated:

> "No person shall hereafter locate any placer mining claim in Alaska *unless* he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office of the judicial division where the location is made. *Any person so authorized* may locate", etc.

In this case it is admitted that the alleged power of attorney from Purdy to Gates was not filed for record until more than twenty days after the purported location under it. Defendant contended, and the trial court ruled, that filing the

power of attorney before any rival claim intervened was a sufficient compliance with the law.

Plaintiff contended, and here contends, that such a construction, or more accurately, such a warping of the plain language of the law avoids one of its main objects. It will not be denied that the chief purpose of the law was to prevent wholesale grabbing of placer ground in new camps. It is conceded that mining law, following general opinion based on experience in mining camps, upholds as matter of public policy the doctrine that the discoverer of a new camp is entitled to enough ground to compensate him for his discovery, but that it is also against public policy and natural right that he should be permitted to monopolize vast areas for speculation. This is an evil which has caused almost limitless litigation and quarrels and more or less bloodshed in many mining camps. It has been a plague which found opportunity largely in the privilege of unlimited locations by power of attorney. To abolish the evil, at the request of almost the whole territory of Alaska, Congress passed the law limiting the number of placer locations by one individual either for himself or for others.

Plaintiff affirms that the requirement that powers of attorney be recorded was a requirement of a showing of good faith and actual authority which logically should precede the acts of location. Otherwise a man might locate four claims each month for acquaintances and obtain powers of attorney

afterward, antedating the instruments. It is needless to suggest to the court that accommodating notaries can be found in all countries who will date an instrument back if sufficiently induced, and usually the inducement need not be great.

Plaintiff urges that proof that it was the intention of Congress in passing the law of 1912 at the behest of Alaska miners, to require among other things the recording of the power of attorney prior to any act of location based upon it, is found in similar laws enacted by two Alaska legislatures soon afterward. Less than nine months after Congress passed the law in question, and before this litigation arose, the first Alaska legislature enacted the following:

> "An act to supplement the mining laws of the United States in their application to the Territory of Alaska;"
>
> "Section 1. That no person shall hereafter locate any mining claim in the Territory of Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, which shall be witnessed by two witnesses but need not be acknowledged, and recorded in the office of the recorder in whose precinct such location is made, *previous to the date of the initiation of such location.*"
>
> Session Laws Alaska, 1913, p. 283.

The Alaska legislature of 1915 under the same title as the foregoing passed a law which contains the following:

> "Section 6. That no power of attorney for the location of placer mining claims in Alaska

> shall be valid or have any force or effect whatsoever, nor shall any location made thereunder be valid or have any force or effect unless such power of attorney be duly executed and acknowledged before an officer authorized to administer oaths, and recorded in the office of the recorder for the district in which such claim is located, *prior to the date of the filing for record of any location thereunder.*"
>
> Session Laws Alaska, 1915, p. 14.

The territorial law of 1913 made specific the plain intent of the Congressional law of 1912. The territorial law of 1915 modified the requirement but still made necessary the filing of the power of attorney before filing record of location. The reason for this modification may be found in the strict requirement of boundary markings and monuments and filing certificate of location, much more drastic provisions than the federal law contains, the latter not requiring the filing of location notice at all. Filing power of attorney must still precede completion of location under it.

The object of requiring this prior showing of authority is to discourage wholesale locations. Most attorney locations are in reality for the prospector himself and are mere evasions of the intent of the law. So well is this understood that total abolition of attorney locations is widely advocated in Alaska.

In this case it is admitted by defendant's witnesses that he was never in Alaska from the alleged date of the alleged power of attorney to the time of

trial of the cause. It did not appear in evidence that he had ever interested himself in the disputed claim, a fact giving rise to suspicion that he was a "straw man" in the whole proceeding. Added to this is the fact that the alleged power of attorney was strangely mislaid. This brings the argument to another issue.

SECOND. THE COURT ERRED IN ADMITTING PAROL TESTIMONY TO SHOW THE CONTENTS OF AN ALLEGED POWER OF ATTORNEY WHEN THE RECORD OF A SO-CALLED POWER OF ATTORNEY UNDER WHICH THE ATTORNEY CLAIMED TO ACT WAS PLEADED IN DEFENDANT'S ANSWER AND THE PRECINCT RECORDER'S RECORD OF THE SAME WAS IN EVIDENCE. FURTHER, THE EVIDENCE OF THE LOSS OF THE DOCUMENT WAS INSUFFICIENT TO LAY A FOUNDATION FOR ADMISSION OF PAROL TESTIMONY.

The power of attorney pleaded is the following:

"July 29 1913

Frank W. Purdy to G. L. Gates

Sworn to before R. McDonald of Forty Mile May 31st 1913

Jas McLeod

Recorded at 55 M. past 6 AM July 29 1913—

By request W. E. McKinney,

(Sgn) H. E. Morgan

H. H. Waller Dep."

The evidence admitted by the court sought to prove a power of attorney of which the foregoing was alleged to be an abstract. To avoid the force of the objection, and disarm the suspicion it aroused, defendant offered and the court admitted over plaintiff's objection, several pages of said volume 1 to show that for several days the recorder merely

recorded abstracts of powers of attorney instead of recording them in full. The whole book was afterward admitted in evidence, and showed that the recorder copied deeds and other instruments in full from the start as he afterward copied powers of attorney. It was stipulated by counsel not to cumber the record on appeal with a transcript of the whole book, as the purposes for which it was introduced are sufficiently shown by testimony and statements of counsel in the trial.

Plaintiff contended at the trial, and urges the contention now, that this queer record, coupled with the failure to produce the original power of attorney at the trial, raises a strong presumption, the almost irresistible conclusion, that the whole story of a power of attorney is a false pretense, that Purdy never gave a power of attorney to Gates; that when Gates and his associates wandered from Yukon territory into the White River district of Alaska they located everything that looked good to them, and in order to blanket the country extensively located numerous claims in the names of acquaintances, writing themselves as attorneys in fact. It is shown by the record that Gates, McKinney, Doyle and Nelson, witnesses for defendant, all located to the legal limit or nearly so, under alleged powers of attorney.

It seems strange that gentlemen who knew so much about the law of placer location by attorney did not make a better showing of authority in the recorder's books or at the trial. It seems likely

that they patched up the best showing they could after the fact. This presumption accounts also for the fact that the recorder for a few days made mere abstracts of powers of attorney on the record while copying all other documents in full. The recorder was aiding the conspiracy.

As defendant has seen fit to rely upon the last foregoing writing as a compliance with the law and has pleaded the book and page in which it appears of record, thereby relying upon this record and basing his rights to the mining claim in controversy upon it, plaintiff submits that he cannot go outside of what appears upon the record as he has pleaded it.

Plaintiff urges that the so-called power of attorney recorded on page 280 of Vol. 1 of the White River recording precinct, is not a power of attorney at all. It might be a deed, a bill of sale, or it might be a power of attorney to do and perform a thousand and one acts and still not be a power of attorney to locate a mining claim. Again whatever kind of an instrument it may be no one could say from reading it that it was "*duly acknowledged*".

> "Acknowledgment as commonly used by the legislature, the courts, and the bar, means both the act and the written evidence thereof. An instrument is not duly acknowledged unless there is not only the oral acknowledgment but the written certificate also as required by the statutes regulating the subjects."
>
> 40 N. E. 75, 78.

It will be noticed that the so-called power of attorney does not even claim to be acknowledged. It states it was sworn to before R. McDonald of Forty Mile, but it does not state whether R. McDonald was authorized to administer oaths, it bears no evidence of a notarial seal, and wholly and utterly fails to comply with the requirements of the law of 1912. Therefore, as the record fails to show upon its face that it is a power of attorney from Purdy to Gates authorizing Gates to locate placer mining claims in Alaska for Purdy, and as it does not show that it is acknowledged as required by the law in question, it was wholly inadmissible in evidence in this case for any purpose whatever.

Defendant was not only bound by the recorded instrument because he pleaded it, but he was also precluded by the fact of record from showing by oral testimony that he had any other power because the recorded document was the only one which gave any notice to plaintiff and the rest of the world that Gates had from him a purported power of attorney. He should not have been permitted to introduce parol testimony because the plaintiff could not be bound by anything but the record. Further, a record of a deed is the best evidence of its contents next to the original deed itself. A public record of deeds has two objects: first to give notice to the world; second, to furnish a copy if the original be lost. When defendant claimed the original to be lost the best secondary evidence of its contents was the recorded copy of it.

"A public record which is in existence can be proven only by the production of the original, or by a certified copy made by the officer who is its proper custodian."

Monk v. Carbin, 12 N. W. 571.

"Where the fact to be proved is one which the law requires to appear of record, the general rule is that the record itself or a properly authenticated copy is the best evidence, and parol evidence cannot be received to prove the fact except where the record is lost or destroyed or is for other reasons inaccessible, and a properly authenticated copy cannot be obtained."

17 Cyc. 497, citing many cases.

In this case defendant pleaded an official record and the record was produced. He should have been compelled to stand on it. It is a case for application of the universal rule that the best evidence obtainable to prove any fact should be required. Record evidence is better than any person's recollection.

By the weight of authority defendant would be bound by the record even if he had not pleaded it. The record is the notice he has given to the world.

"A record is a constructive notice, only when, and so far as, it is a true copy. * * * The test is a plain and simple one. It is, whether the record, if examined and read by the party dealing with the premises, would be an *actual* notice to him of the original instrument, and of all its parts and provisions. * * * A record can only be a constructive notice, at most, of whatever is contained within itself."

2 Pomeroy's Eq. Jur., Sec. 654.

"Whether subsequent purchasers of mortgages are charged with constructive notice of the contents of an instrument that has been filed for record in the recorder's office, notwithstanding such instrument is afterwards incorrectly or improperly copied into books kept therefor, has been decided differently in different states; but it was held at an early day in this state, and must be regarded as a settled rule, that they have constructive notice of only such matters as appear from the instruments as copied into the proper books. In Chamberlain v. Bell, 7 Cal. 292, it was held that an instrument which was incorrectly transcribed by the recorder did not give constructive notice of its contents to a subsequent purchaser, but that such purchaser had the right to rely upon the instrument as it appeared upon the face of the record. In Donald v. Beals, 57 Cal. 399, the court said that, where there is a conflict between the actual record as it appears in the record book and the constructive record by the indorsement made upon the instrument at the time it was deposited for record the latter must give way to the former.

* * * * * *

The principle upon which the rule rests is that as, under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or incumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument into the appropriate book. Neslin v. Wells, 104 U. S. 428, 26 L. Ed. 802; Terrell v. Andrew Co., 44 Mo. 309. For this purpose the recorder is the agent of such grantee, and the errors or omissions

of the recorder in making such transcription are his errors or omissions in the same manner as are the errors of a sheriff in executing a writ, or of a clerk in recording an order or a judgment."

Cady v. Purser, 63 Pac. 845.

"Where the defendant bought the property in question and recorded his deed, but by mistake the number and description of the lots were omitted in the record, and plaintiff subsequently bought the same lots of the same grantor, and afterwards the common grantor of both procured the record of defendant's deed to be amended by interlineation of the description: *Held,* that the plaintiff had no notice of the previous conveyance of the property to defendant."

Chamberlain v. Bell, 2 Cal. 293.

"The negligence of the recorder in recording a conveyance in the wrong book cannot affect third persons, but the injury must fall on the parties to the conveyance."

* * * * * *

Watkins v. Wilhoit, 35 Pac. 646.

"A record of a mortgage indexed as 'Scandinavian Congregational Church, Trustees of', as grantors, is not constructive notice to a subsequent mortgagee taking a mortgage from the 'Scandinavian Free Church'."

Cong. Church Bldg. Soc. v. Scand. Free Church of Tacoma, 64 Pac. 750.

In Neslin v. Wells-Fargo Company, reported in 104 U. S. 802, the Supreme Court held that:

"A record of a deed in a book of mortgages does not convey the information required by statute and is, therefore, not effectual notice."

The so-called power of attorney as it appears of record was never entitled to be recorded for the reason that the statute requires that the power of attorney be duly acknowledged.

> "The record of a deed filed in the office of a register of deeds, May 21, 1883, acknowledged before a notary public in this state, but not authenticated with his notarial seal, cannot be received in evidence under the provisions of Section 12, c. 87, Sess. Laws 1870; Section 387 a. Code, (Comp. Laws 1879)."
>
> Meskimen v. Day, 10 Pac. 14.

In view of the above, it is respectfully submitted that the decision of the court below ought to be reversed.

T. C. West,
T. J. Donohoe,
E. E. Ritchie,
O. A. Tucker,
Attorneys for Plaintiff in Error.